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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSEPH RUZICKA AND CHARLES RUZICKA, INDIVIDUALLY, AND AS CO-PARTNERS, TRADING AS SEELEY DAIRY
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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OPINION BELOW.

The District Court entered findings of fact, conclusions of law, order for judgment and final judgment as set forth in the record (R. 117-123). The Circuit Court of Appeals reversed the District Court, the opinion appearing in the record (R. 135-142) and reported 152 F. 2d 167.

JURISDICTION.

Petitioner invokes jurisdiction of this Court by virtue of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347), and Rule 38 of this Court.

QUESTION PRESENTED.

Whether the Circuit Court of Appeals was correct in requiring the petitioner, complaining of the respondents under the various provisions of the Agricultural Marketing Agreement Act, to come forward with evidence to prove its allegations which were denied by the respondents in the District Court as the initial forum chosen by the petitioner.

STATUTE AND ORDER INVOLVED.

Action was instituted under provisions of the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 601, *et seq.*). The petition for writ of certiorari sets forth most of the sections of the Act involved. These sections involved are as follows:

> 8a (6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.

The section omitted by petitioner provides for an administrative process by the Secretary of Agriculture prior to the institution of suit under the previous section. The omitted section is as follows:

8a (7) Upon the request of the Secretary of Agriculture it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this chapter. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

The other pertinent sections of the Act are as follows:

8a (8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this chapter or now or thereafter existing at law or in equity.

8a (15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

8a (15) (B) The District Courts of the United States (including the district court of the United States for the District of Columbia) in any district

in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

The Order involved is an executive order of the Secretary of Agriculture promulgated by virtue of the Agricultural Marketing Agreement Act. It is commonly known as Order 41, as amended, regulating the minima prices for milk and milk products in the Chicago, Illinois marketing area. The form relied upon is set forth in the record (R. 43-65). The Order fixes prices for fluid milk based upon various use classifications.

Equalization is sought by a fund into or from which payments or withdrawals are made according to the relative use classification of the products of each dairy. The pertinent section of the Order under which the petitioner sought to collect monies from the respondents in the District Court is the following (R. 61-62):

8 (g) *Adjustments of Errors in Payments.* Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to the producer-settlement fund pursuant to paragraph (d) of this section, the market administrator shall promptly bill such handler for any unpaid amount and such handler shall, within 5 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler, pursuant to paragraph (d) of this section, the market administrator shall, within 5 days, make such payment to such handler. Whenever verification by the market administrator of the payment by a handler to any producer, for milk purchased or received by such handler, discloses payment to such producer of less than is required by this section, the handler shall make up such payment to the producer not later than the time of making payment to producers next following such disclosure.

Contingencies for errors by the auditors of the market administrator or the parties and disputes over indebtedness are provided for by means of a reserve fund in the Order (R. 60):

7 (b) (5) Subtract not less than 4 cents nor more than 5 cents to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers. The result shall be known as the uniform price for milk containing 3.5 percent butterfat received from producers at plants located within the 70-mile zone.[1]

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1. The appendix in appellee's brief filed in the Circuit Court of Appeals (Appellee's Brief, p. 29) showed a reserve fund on October 31, 1944 of $76,896.16.

STATEMENT.

The record shows that the pricing Order involved became effective September 1, 1939; that since at least that date the respondents operate a dairy in the City of Chicago. Without prior administrative proceedings either by the Secretary of Agriculture under Section 8(a) 7 of the Act or the respondents under Section 8(c) 15 of the Act the petitioner filed an action in the District Court on September 15, 1942 alleging an indebtedness to the equalization fund of the Order. Petitioner alleged "errors in payments * * * have been disclosed by an audit of the defendants' books and records," a billing for indebtedness and non-payment (R. 6). The answer denied indebtedness, disclosure of errors and violation and pleaded affirmatively that the audit was inaccurate (R. 70). No violation of the Order other than indebtedness was alleged.

A supplemental complaint (R. 73) and answer thereto (R. 89) were filed realleging and denying indebtedness for a further period. An affirmative allegation that the billing "was based upon an erroneous, improper, incomplete and inaccurate inspection or audit of the defendants' accounts, books, records and activities of their transactions" was made. Another affirmative allegation, referring to the various administrative proceedings available, was made setting forth that no administrative determination was made by the Secretary of Agriculture prior to the institution of the action (R. 94).

Petitioner has referred to a petition by respondents to stay (R. 95) filed in the District Court. This petition was never ruled upon and was at the request of respondents and with the immediate consent of the petitioner before consideration of the various motions by the District Court

withdrawn from the record (R. 108). Having been withdrawn the petition [2] is not properly a part of the record, either of the trial court or of a reviewing court. *McClellan* v. *Carland*, 217 U. S. 268; *Southern Ry. Co.* v. *Walters*, 284 U. S. 190.

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2. Petitioner has by footnote (Petn. for Cert. p. 12) set forth matters which respondents submit are not properly a part of the record nor statement of the case. If considered however, respondents wish to submit the following as a more complete record of proceedings:

The first petition to the Secretary of Agriculture was filed October 30, 1943. It prayed for a showing by the Secretary of Agriculture of the basis for the amounts of monies claimed in the District Court action. On December 18, 1943 a hearing was denied on the petition for being vague, unsupported in facts.

The second petition was filed May 3, 1944. After a conference with U. S. Department of Agriculture Solicitors this was amended in July, 1944. The petition complained of bills being sent, set forth that no indebtedness existed and requested the Secretary of Agriculture to produce records to substantiate his claims of indebtedness. The solicitors refused to furnish the basis for the bills either at a pre-hearing conference on July 27, 1944, or by the time of the hearing, October 12, 1944. Since the respondents (petitioners there) had no evidence of indebtedness to meet they suggested a continuance.

The hearing officer withheld action until the District Court had entered judgment, October 20, 1944, then on December 12, 1944 dismissed the petition with leave to file an amended petition.

The next petition was filed January 18, 1945, again requesting the basis of the claims of indebtedness. Informal request for the records was made April 2, 1945 to the Market administrator and the solicitors. This was denied.

On May 18, 1945 a written motion was presented to the hearing officer for an order on the market administrator to show the basis of the claims. This was denied.

The District Court granted plaintiff's motion for judgment on the pleadings entering findings of fact, conclusions of law and final judgment order (R. 117). No evidence had been submitted by petitioner, nor were respondents permitted to offer any evidence.

Appeal was taken to the Circuit Court of Appeals for the Seventh Circuit. On October 30, 1945 that Court reversed the District Court remanding the same for trial, holding that petitioner had to prove its allegations of indebtedness and that respondents could avail themselves of any legal or equitable defense under the general powers of the Court. Petitioner's petition for rehearing was denied January 5, 1946 (R. 144).

On May 29, 1945 written motion was presented requesting that the administrative proceeding be held in abeyance until the Circuit Court of Appeals rendered its decision. This was opposed and denied. The respondents (petitioners there) then withdrew their petition under Sec. 8c 15 A of the Act.

SUMMARY OF ARGUMENT.

I.

There is no conflict of law in the two decisions of the Ninth and Seventh Circuit Courts of Appeals.

II.

The Congress did not divest the District Courts of their legal and equitable powers by enactment of the Agricultural Marketing Agreement Act.

III.

The decision below concerns only private as against public rights and is not of a generally important nature as to merit further action by this Court.

ARGUMENT.

I.

There is no conflict of law in the two decisions of the Ninth and Seventh Circuit Courts of Appeals.

Petitioner's brief directs attention to the Ninth Circuit case of *La Verne Co-op. Citrus Ass'n* v. *United States,* 143 F. 2d 415 as a decision in conflict. That case arose in a different manner. An examination of the facts of the two cases indicate these differences:

1. In the *La Verne* case the violation of the order was admitted; in this case violation has been denied.

2. In the *La Verne* case the order fixed quantity shipments of lemons and the defendants admitted shipments in excess. In this case the prices fixed were not attacked but the claim of indebtedness arising by *operation* of the order rather than *existence* of the order has been attacked. Indebtedness has been denied.

3. In the *La Verne* case the handlers had voluntarily instituted and were "actively pursuing" their rights in the administrative process (Sec. 8(c) (15) (B) of the Act.) when they attacked the *desirability* of the order in court. In the instant case the petitioner selected the District Court as the initial forum for the determination of its controversy with the respondents. The *desirability* of the order was not at issue in the Circuit Court of Appeals in the instant case.

Differences in factual situations will give rise quite naturally to differences in legal conclusions. The Circuit Court of Appeals in the instant case reached "a contrary conclusion to that announced in the *La Verne* case," by reason of the different factual basis (R. 141). The test for the granting of certiorari requires divergent conclusions of law upon the same factual basis. *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387 dismissing certiorari. *Sanchez* v. *Borras*, 283 U. S. 798. *Reconstruction Finance Co.* v. *Bankers Trust Co.*, 318 U. S. 163.

Respondents submit that the two decisions of the Circuit Court of Appeals are correct and harmonious. *United States* v. *Carver*, 260 U. S. 482. *American Const. Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372. The fact that District Courts' milk order cases prior to the Circuit Court of Appeals' decision in this case have decided otherwise gives no basis for further appeal since the instant case is the first case on review to be decided on the point.

II.

The Congress did not divest the District Courts of their legal and equitable powers by enactment of the Agricultural Marketing Agreement Act.

Throughout this litigation petitioner has urged that the conferring of additional jurisdiction upon the District Courts under the Act operated to divest the Courts of their normal powers[3]. (Judicial Code, Section 24,

3. "The search for significance in the silence of Congress is too often the pursuit of a mirage. * * * denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts." *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, 16, 17.

amended, 28 U. S. C. 41). Inherent powers of the District Courts have been recognized and upheld in the two cases involving this issue decided by this Court.

On first-impression this Court recognized the rights of *handlers* to raise an issue in the judicial forum. The issue was recognized and decided *judicially* in an enforcement proceeding.

> "The defendants * * * contend that the bills include in their computation milk plainly excluded by the terms of the Order because the product of dairies without the certificate of registration * * * The explanation of the plaintiff is that the Order covers this milk.
>
> "The Administrator seeks payment on the basis of all milk received by licensed handlers for use in the Marketing area * * *
>
> "As the action of the handlers forms the ground for the initiation of regulation under the Act and for classification, reports, calculation and payment under the Order, *we conclude* that the milk received by handlers for use in the area is the proper basis of computation." *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 600. (Italics supplied).

Courts should be jealous of their powers, guarding them carefully against encroachments operating under the guise of expediency. Arbitration like administrative action may be urged as more expedient but their existence can not preclude jurisdiction in a judicial forum.

This same principle under this Act has recently been again invoked. In *Stark* v. *Wickard*, 321 U. S. 288, 303, 64 S. Ct. 559 (1944) the Court said:

> "The Act bears on its face the intent to submit many questions arising under its administration to judicial review. Secs. 8a (6), 8c (15), (A) and (B). It specifically states that the remedies specifically provided in Sec. 8a are to be in addition to any reme-

dies now existing at law or equity. Sec. 8a (8). This Court has heretofore construed the Act to grant handlers *judicial* relief in *addition* to the statutory review specifically provided by Sec. 8c (15). On complaint by the United States, the handler was permitted by way of defense to raise issues of a want of statutory authority to impose provisions on the handlers which directly affect such handlers. *U. S.* v. *Rock Royal Co-op.*, 307 U. S. 533, 560, 561, 59 S. Ct. 993, 1006, 1007, 83 L. Ed. 1446". (Italics supplied.)

And the Court further guaranteed *judicial* relief, saying:

"With this recognition by Congress of the applicability of judicial review in this field, it is not to be lightly assumed that the silence of a statute bars from the courts an otherwise justiciable issue." *Stark* v. *Wickard*, 321, U. S. 288, 309, 64 S. Ct. 559 (1944).

Petitioner urges that this inherent power be overruled by reason of the administrative process. But the Congress in providing for administrative relief contemplated the co-existing rights of judicial and administrative determination by giving to the handler the option of administrative or judicial relief.

"Any handler subject to an order *may* file a written petition with the Secretary of Agriculture * * * " (Italics supplied 8 (c) (15) (A). The discretionary "may" was chosen rather than the mandatory "shall". A handler is not required by the Act to seek his administrative relief before complaining to a judicial forum as frequently occurs in other Acts of Congress such as Office of Price Administration matters.

Consideration of the entire Act evidences the intent of Congress to grant a handler his choice of forum. The Secretary of Agriculture has his choice of a forum for a determination of an amount due also.

"• • • Whenever the Secretary or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued, pursuant to this title the Secretary shall have the power to institute an investigation and, *after due notice* to such handler, to conduct a *hearing* in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action." Sec. 8a (7) of the Act. (Italics supplied).

The complaint (R. 3) alleges that the action was instituted at the request of the Secretary but the record shows that no prior administrative *hearing* or *determination* of the amount which might be due was held.

The judicial forum was the original forum for determination of the controversy. Questions of indebtedness have since the earliest days of the English court systems been questions of judicial cognizance. Further, the judicial forum was selected by the petitioner. Under its theory any billing, whether correct or incorrect, trivial or tremendous, must be paid in court immediately. Then the handler may proceed to claim its refund through the slow administrative process of petition and appeal[4]. Such a procedure could be ruinous to the business standing and credit of a dairy. The Act provides for no stay of execution or supplemental process after entry of decree of mandatory injunction for payment of monies as has been entered in dairy order cases. The Act only states that the "proceedings • • • shall abate" whenever the administrative process is completed. In the instant case under peti-

4. As to slowness and difficulties of administrative proceedings see footnote on p. 8 herein explaining how market administrator refused to show basis of billing and insisted that handlers had the burden of proving their *own* reports *wrong*.

tioner's theory the respondents must pay immediately all monies claimed regardless of the propriety of the claim. An inequitable forfeiture would result to deny dairies their right to their day in court. Such a construction is patently not justiciable. The decision of the Circuit Court of Appeals stands as a correction of the previous decisions of the District Courts in dairy order indebtedness cases.

III.

The decision below concerns only private as against public rights and is not of a generally important nature as to merit further action by this Court.

Petitioner has suggested that the successful operation of dairy orders requires a review of the case by this Court. On the contrary the success of the operation of an administrative order will increase if market administrators are held to strict proof of their demands for payment. Laws of legislative bodies and courts find their foundation and support in "common sense." Respondents submit that the decision below imports that "common sense" into the law. Business practice and courts have always abided by the principle that a person charging indebtedness and seeking monies must show the indebtedness, if denied. To hold otherwise would be tantamount to a presumption of guilt repugnant to our Constitution.

Questions as to the necessity for or desirability of a food order or an amendment to or correction of the order might properly be argued to be a matter of administrative determination as a quasi-legislative problem. But to hold that the imposition of a financial obligation and the collection thereof is not a judicial problem disregards our

established three branch government. As borne out by the *La Verne* case of the Ninth Circuit, the economic and agricultural *desirability* of an order being an aspect of the promulgation of the order differs inherently in fact and principle from the attempted imposition of a financial responsibility under the operations of an order whose existence is not now attacked.

With the decision in the Circuit Court of Appeals in the instant case on food orders, the Government may now have its administrative determination or a judicial determination at its own election and be prepared to substantiate its claims in either forum.

Conclusion.

In conclusion respondents submit that the decision below is correct, that the case presents no conflict of decisions nor question of general public import.

Respondents respectfully submit that the petition for certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be denied.

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